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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON

BRIEF OF PETITIONER

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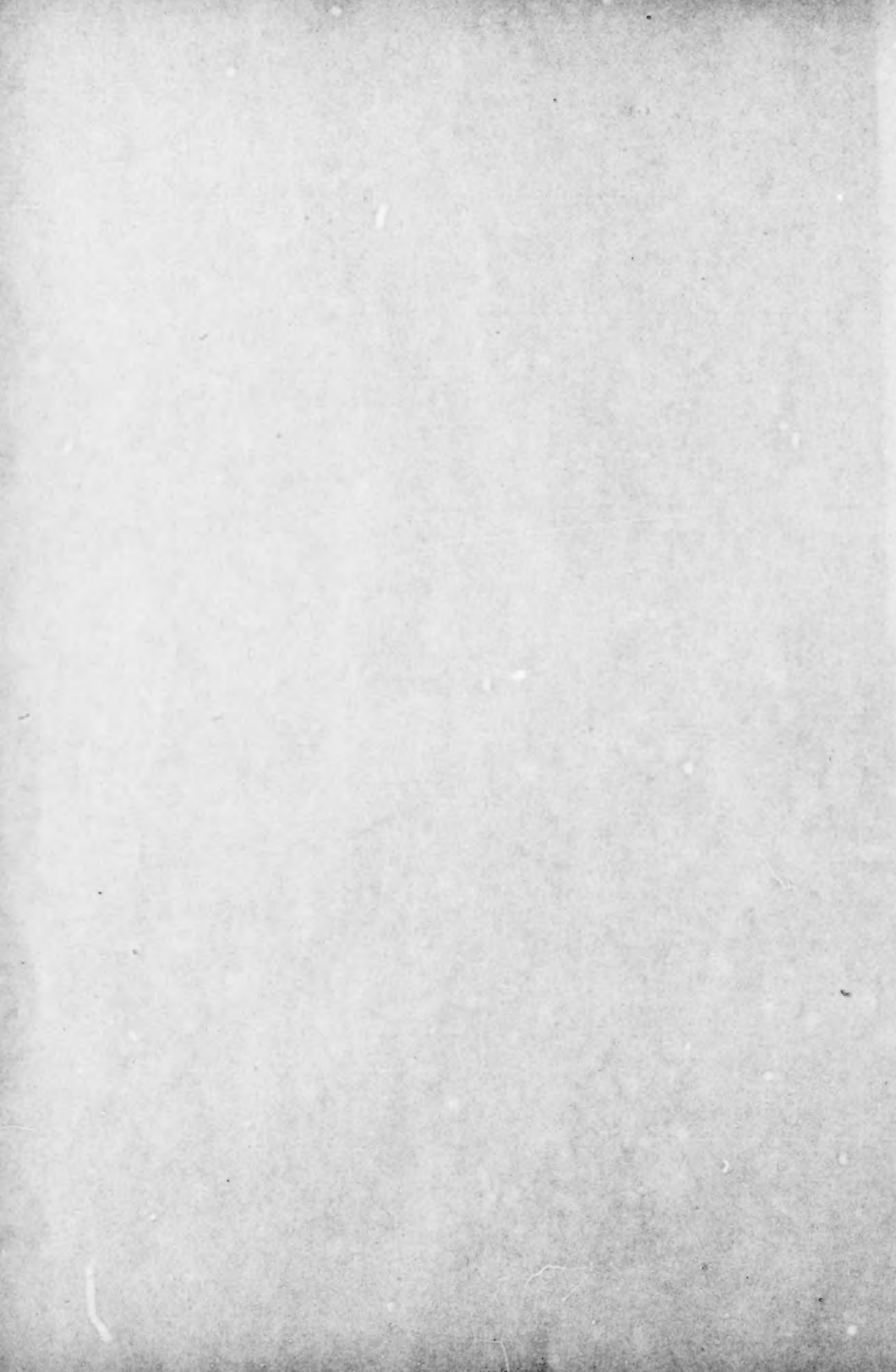


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CITATION TO OPINION BELOW

Petitioner was charged with Escape in the Second Degree, Oregon Revised Statutes, 162.155. Petitioner was tried on September 25 and 26, 1975, and was found guilty by a jury. He was sentenced on October 1, 1975. Petitioner appealed the judgment of the trial court to the Oregon Court of Appeals.

The Oregon Court of Appeals reversed petitioner's conviction in *State of Oregon v. Ensio Ruben Lakeside*, 25 Or. App. 539, 549 P.2d 1287 (1976). The State of Oregon petitioned the Oregon Supreme Court for review of the opinion of the Court of Appeals and review was granted.

The Oregon Supreme Court reinstated petitioner's conviction and reversed the decision of the Oregon Court of Appeals, with one Justice dissenting, *State of Oregon v. Ensio Ruben Lakeside*, 277 Or. 569, 561 P.2d 612 (1977). On April 12, 1977, a petition for rehearing was denied without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED

Is it a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and a violation of a defendant's Right to Counsel, guaranteed by the Sixth Amendment to the United States Constitution, for a trial court to comment on a defendant's failure to testify at his trial, by giving a jury instruction concerning this fact, after a defendant has made a timely objection to the giving of this instruction prior to the charge to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this petition are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Amendment V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of his life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due

process of law; nor deny to any person within its jurisdiction equal protection of the laws . . .”

STATEMENT OF FACTS

Petitioner was charged with Escape in the Second Degree, ORS 162.155. Petitioner stood trial on September 25 and 26, 1975. As part of his trial strategy, petitioner did not take the stand, and petitioner's counsel was careful to avoid any mention of this fact in voir dire or opening and closing arguments.

Prior to instructing the jury, the trial court met with counsel in chambers. At that time the trial court informed counsel that it intended to give the following instruction:

“Under the laws of this State, a defendant has the option to take the witness stand to testify in his or her own behalf. If a defendant chooses not to testify, such a circumstance gives rise to no inference or presumption against the defendant, and this must not be considered by you in determining the question of guilt or innocence.”

Petitioner's counsel informed the Court that he did not want the instruction read to the jury. The trial court gave the instruction to the jury despite this timely objection. [Tr. 231] Following the charge to the jury the following took place:

“THE COURT: Motion for mistrial will be denied.

“Does the defendant have any further exceptions?

“MR. MARGOLIN: Yes, I have one exception.

"I made this in chambers prior to the closing statement. I told the Court that I did not want an instruction to the effect that the defendant doesn't have to take the stand, because I felt that that's like waving a red flag in front of the jury, so I do have an exception to the instruction given to the effect that the defendant doesn't have to take the stand, and that that should not be considered against him.

"THE COURT: The defendant did orally request the Court just prior to instructing that the Court not give the usual instruction to the effect that there are no inferences to be drawn against the defendant for failing to take the stand in his own behalf.

"The Court felt that it was necessary to give that instruction in order to properly protect the defendant, therefore, the defendant may have his exception." [Tr. 235]

Petitioner was convicted and appealed his case to the Oregon Court of Appeals which reversed his conviction on June 1, 1976. The Oregon Supreme Court took review and reversed the Oregon Court of Appeals in a decision filed on March 17, 1977. On October 11, 1977, this Court granted petitioner's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution states that a defendant in a criminal case cannot be compelled to be a witness against himself. This Court has held that it is a violation of this Fifth Amendment right for a prosecutor or trial judge to comment on the

failure of a defendant to testify at his trial if the defendant chooses to exercise his Fifth Amendment privilege. *Griffin v. California*, 380 U.S. 609 (1965).

The Sixth Amendment to the United States Constitution guarantees the assistance of counsel for those on trial for a criminal charge. This Court has long recognized that "the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Gedders v. United States*, 425 U.S. 80, 88 (1976).

One of the most important decisions a criminal defendant makes is the decision not to testify at his trial. In the case at bar, petitioner, an indigent layman, was appointed counsel to advise him, among other things, whether or not to take the stand in his defense. It was decided that petitioner would not testify and no comment was made concerning this fact in voir dire, opening argument or closing argument so as not to call attention to petitioner's failure to testify.

Every criminal case has a different set of facts. The trial judge sees these facts in the sterile atmosphere of the courtroom. Defense counsel lives with the case and is privy to information, for instance attorney-client communications, of which the trial judge is never aware. Competent trial counsel is much better equipped to decide trial strategy than a trial judge who enters the case only on the day of trial. When petitioner's counsel asked the trial court not to give the "failure to testify" instruction he was providing the assistance of counsel of which the Sixth Amendment speaks. Petitioner's counsel concluded that giving the "failure to testify" instruction would be "like waving a red flag

in front of the jury” and, as such, would constitute the type of comment on petitioner’s failure to testify that is constitutionally prohibited.

When the trial court gave the instruction it interfered with the guidance provided by counsel and it violated petitioner’s Right to Counsel guaranteed by the Sixth Amendment to the United States Constitution.

The giving of the instruction constituted a comment on the exercise of petitioner’s right to be free from Self-Incrimination and it violated a right guaranteed to petitioner by the Fifth Amendment to the United States Constitution.

ARGUMENT

I.

THE ISSUE

The issue raised by petitioner in this case is very narrow. The issue is whether it is a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and the Right to Counsel guaranteed by the Sixth Amendment to the United States Constitution for a trial judge to instruct the jury concerning the failure of a defendant to testify when defense counsel has objected to the giving of this instruction prior to the charge to the jury.

This is not a case where no objection is made prior to the giving of the “failure to testify” instruction and the Court gives such an instruction *sua sponte*. This is not a case where the Court gives such an instruction *sua*

sponte and objection is made after the instruction is given. This is not a case where one co-defendant asks for the instruction and the other co-defendant objects.

II.

THE TRIAL COURT VIOLATED THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT GAVE AN INSTRUCTION TO THE JURY CONCERNING THE PETITIONER'S FAILURE TO TESTIFY AT HIS CRIMINAL TRIAL, AFTER PETITIONER OBJECTED TO THE GIVING OF THIS INSTRUCTION PRIOR TO THE CHARGE TO THE JURY.

The Fifth Amendment to the United States Constitution states that:

"No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

In *Griffin v. California*, 380 U.S. 609 (1965), the defendant did not testify at trial. The prosecutor commented to the jury on the failure of the defendant to testify. The trial judge instructed the jury that the defendant had a constitutional right not to testify but went on to say that the jury could consider this failure to testify as evidence bearing on the question of whether or not he was guilty of the crime charged. This Court reversed the defendant's conviction holding that the Fifth Amendment to the United States Constitution forbids either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt.

Several courts have reached the conclusion, either in a holding or in dicta, that it is error for a court to instruct a jury concerning the failure of a defendant to testify when defense counsel has made a timely objection to the giving of the instruction. In *People v. Molano*, 253 Cal. App. 2d 841, 61 Cal. Rptr. (1967), an instruction identical in content to the instruction given in the case at bar was read to the jury over objection of defense counsel. The California Court of Appeals, Second District, Division Four held that:

"Since *Griffin v. State of California*, (Apr. 1965) 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt, are forbidden. Defendant contends, and we believe correctly so, that to give this instruction when he did not want it to be given was tantamount to making a 'comment' proscribed by *Griffin*. The argument being that such an instruction highlights and emphasizes the fact that the accused did not take the stand.

"Particularly apt here, we believe, is the comment of Mr. Justice Douglas in his dissenting opinion in *United States v. Gainey*, (Mar. 1965) 380 U.S. 63, 73 . . .

'Just as it is important for counsel to argue from the defendant's silence, *so is it improper for the trial judge to call attention to the fact of defendant's silence*. Indeed, under 18 U.S.C. Section 3481, the defendant is entitled as a matter of law to have the trial judge expressly tell the jury that it must not attach any importance to the defendant's failure to testify; *or if the defendant sees fit, he may choose to have no mention made of his silence by anyone*.

Bruno v. United States, 308 U.S. 287, 60 S. Ct. 198, 84 L. Ed. 257' [Emphasis added]" *Id.*, 61 Cal. Rptr. at 824-825.

In *Gross v. State*, 306 N.E.2d 371 (1974) the Indiana Supreme Court reversed an armed robbery conviction when the trial court gave the "failure to testify" instruction over objection of defense counsel. That court held:

"The decision to remain silent is an often used trial tactic. For one reason or another, the accused and his counsel decide that the accused's interests will best be served by exercising Fifth Amendment prerogatives. In order for the privilege to be fully utilized, it is essential that no aspersion whatsoever be cast upon the accused for his failure to testify. Thus, it is necessary to closely regulate all judicial (as well as prosecution) statements regarding the accused's silence.

"We do not believe that all such judicial comments are violative of Fifth Amendment rights. However, we do believe that the accused should *request* any instruction which requires the jury not to draw negative inferences from an accused's silence or *consent* (either expressly or impliedly) to the giving of the instruction. If, as a trial tactic, the defense determines that such an instruction would assist its case, he may request the judge to so instruct. Furthermore if the judge *sua sponte* offers to give the instruction, and the defense fails to object, the defense will be deemed to have consented to its submission. However, if the judge states his intentions to submit the instruction and the defense *does* object, the giving of the instruction constitutes an invasion of Fifth Amendment rights and judicial error." *Id.*, at 372-373

In *State v. Kimball*, 176 N.W.2d 864 (1970) the Iowa Supreme Court reversed for reasons unrelated to this appeal. However, the court did discuss the issue raised here.

"It is not claimed the instruction given is an erroneous statement of the law. It is claimed to be prejudicial because it calls the jury's attention to defendant's failure to take the stand.

* * *

"We must recognize, however, that the instruction is a comment on defendant's failure to testify even though it is supposedly for defendant's benefit and is designed to keep the jury from speculating on the reasons for his failure to take the stand and drawing improper inferences therefrom. There are those who believe the instruction is more harmful than helpful and regardless of how favorably to the accused the instruction may be worded it may inadvertently cause the jurors to consider certain adverse inferences which would not otherwise have entered their minds.

"Because of the divergent opinions in this sensitive area and as the giving of even a cautionary instruction favorable to defendant may violate the spirit of *Griffin v. State of California*, supra., we believe it is advisable for us to take a definitive position on this issue. We now hold that such instruction should not be given in any future trial unless it is requested by defendant, and that it would be considered error if it is given, absent such request, in any trial started after the date this opinion is filed." *Id.*, at 869.

Other cases have held, without discussing the Fifth Amendment, that it is reversible error for a court to give the instruction over objection: *People v. Hampton*,

394 Mich. 437, 321 N.W.2d 655 (1975); *Russell v. State*, 240 Ark. 97, 398 S.W.2d 213 (1966); *Villines v. State*, 492 P.2d 343 (Okla. Ct. of Crim. Appeals 1971).

See also, *State v. White*, 285 A.2d 832 (Me. 1972); *United States v. Smith*, 392 F.2d 302 (CA 4, 1968); *Mengarelli v. United States Marshall*, 476 F.2d 617 (CA 9, 1973); *People v. Horrigan*, 253 Cal. App. 2d 519, 61 Cal. Rptr. 403 (Ct. of App., 4th Dist., Division 2, 1967).

Under Federal law, *Bruno v. United States*, 308 U.S. 287 (1959) and the law of the State of Oregon, *State v. Hale*, 22 Or. App. 144, 537 P.2d 1173 (1975) a defendant has an absolute right to have the "failure to testify" instruction given if he requests it. Several courts which have held contrary to petitioner's position have done so under the mistaken belief that the instruction is always helpful rather than prejudicial to a defendant, *United States v. Schwartz*, 398 F.2d 464, 469 (CA 7, 1968) *cert. den.* 393 U.S. 1062 (1969); *United States v. Rimanich*, 422 F.2d 817, 818 (CA 7, 1970); *United States v. McGann*, 431 F.2d 1104, 1109 (CA 5, 1970), or because the court "cannot see how an identical instruction will affect the jury differently by the fact that unbeknown to it, in one case there was an objection and in the other there was not", *State v. Baxter*, 51 Haw. 57, 454 P.2d 366, 367 (1969).

The wording of the instruction is not at issue here. Prejudice arises when the instruction is read in a situation where it should not be read, thus calling attention to the fact that defendant has stood mute. Each criminal case has a different set of facts. Under certain circumstances it is advantageous to have the trial court instruct the jury concerning the defendant's

failure to testify. If the defendant can not take the stand for some reason and there is evidence in the trial that can only be explained by the defendant, then defense counsel would want to have a "failure to testify" instruction given to the jury in hopes that they will not hold the defendant's failure to testify against him.

Under other circumstances, it is extremely disadvantageous to have a "failure to testify" instruction given. Suppose that defendant puts on an alibi defense and produces several witnesses to testify that the defendant was at some place other than at the scene of the crime at the time that the crime was committed. Furthermore, assume that the defendant has a lengthy criminal record, including convictions for the crime charged, and makes a bad appearance on the stand. Since the defendant would add nothing to the testimony of the alibi witnesses and would injure his cause by taking the stand, trial strategy dictates that defense counsel not put defendant on the stand and try to call as little attention as possible to defendant's failure to take the stand. If the defendant's witnesses supply all the information that the defendant would supply had he taken the stand, the jury will probably not think too much of the defendant's failure to take the stand. Under such circumstances, a defense counsel would not want to have the failure of the defendant to take the stand highlighted by the giving of an instruction concerning this fact. Instructing the jury under these circumstances amounts to waving a red flag in front of the jury concerning the fact that the defendant has failed to give his side of the story.

The giving of an identically worded "failure to testify" instruction can be harmful or helpful depending on the facts of the individual case. Defense counsel, if competent, is the best person to determine when the instruction would be helpful and when it would be prejudicial. If a judge gives the instruction after objection in a case where giving it would be prejudicial, giving the instruction constitutes a "comment" on the failure of the defendant to testify and is as harmful to a defendant's position as an illegal comment by the prosecutor about this fact.

III.

THE TRIAL COURT VIOLATED THE "ASSISTANCE OF COUNSEL" CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT GAVE AN INSTRUCTION TO THE JURY CONCERNING PETITIONER'S FAILURE TO TESTIFY AT HIS CRIMINAL TRIAL, AFTER PETITIONER OBJECTED TO THE GIVING OF THIS INSTRUCTION PRIOR TO THE CHARGE TO THE JURY.

The Sixth Amendment to the United States Constitution states that:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

"The decisions of [the United States Supreme Court] have not given to [the constitutional provisions of the Sixth Amendment] a narrow literalistic construction. More specifically, the right

to the Assistance of Counsel has been understood to mean that there can be no restriction upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding process that has been constitutionalized in the Sixth and Fourteenth Amendments . . . the right to Assistance of Counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary fact finding process." *Herring v. New York*, 422 U.S. 853, 857-858 (1975)

In *United States v. Ash*, 413 U.S. 305 (1973), this Court discussed the historical background of the Sixth Amendment:

"A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or coping with an intricate procedural system. The function of counsel as a guide through complex legal technicalities long has been recognized by this court. Mr. Justice Sutherland's well-known observations in [*Powell v. Alabama*, 287 U.S. 45 (1932)] bear repeating here:

'Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every

step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.' 287 U.S., at 69.

"The Court frequently has interpreted the Sixth Amendment to assure that the 'guiding hand of counsel' is available to those in need of its assistance . . ." *Id.*, at 307-308

Later on this Court stated that:

"... Mr. Justice Black, writing for the Court in *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938), spoke of this equalizing effect of the Sixth Amendment's counsel guarantee:

'It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.'

"This historical background suggests that the core purpose of the counsel guarantee is to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *Id.*, at 309

Petitioner, an indigent layman, had to have counsel appointed so that he might have the benefit of the advice of someone trained in the law at his trial. One of the most important decisions a criminal defendant makes is the decision not to testify at his trial. Petitioner, with the help of his counsel, decided that it would be adverse to his interests to testify at his trial. As part of his trial strategy, no comment was made concerning petitioner's failure to take the stand in voir

dire and opening or closing arguments so as not to highlight this fact.

Every criminal case has a different set of facts. A trial judge sees these facts in the sterile atmosphere of the courtroom. Defense counsel lives with a case and is privy to information, for instance attorney-client communications, of which the trial judge is never aware. Competent trial counsel is much better equipped to decide trial strategy than a trial judge who enters the case for the first time on the day set for trial. When the trial court gave the objected to instruction, it called attention to the fact that petitioner had not testified and destroyed all of the possible benefits that might have enured to petitioner because of his trial strategy. Additionally, had petitioner's counsel known that the trial court was going to "comment" on his client's failure to testify, he might have changed his strategy and voir dired the jury on the effect that petitioner's not testifying would have on its deliberation. He might also have commented on this fact in his opening and closing statements.

In *Brooks v. Tennessee*, 406 U.S. 605 (1972) this Court held that a Tennessee statute that required a defendant in a criminal case to testify before any other witness for the defense if he was to testify at all was unconstitutional because it restricted the right of counsel to decide whether, and when, the accused should take the stand during his trial. In arriving at that decision, this Court stated:

"Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an

opportunity to evaluate the actual worth of their evidence, the statute restricts the defense — particularly counsel — in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of the ‘guiding hand of counsel’ in the timing of this critical element of his defense. While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand.” *Id.*, at 612-614

In the case at bar, we are dealing with another important tactical decision concerning the same constitutional right discussed in *Brooks*. In *Brooks*, the question was when or whether the defendant should testify. In this case, the question for counsel is, once a defendant has decided to exercise the right not to testify, how best to deal with the jury concerning this fact. In *Brooks*, this court decided that trial judges ordinarily have the power to set the order of proof but, because an important constitutional consideration was present, the trial judge did not have the power to interfere with a trial strategy decision concerning whether or when the defendant would take the stand. In the case at bar, because of the constitutional considerations involved, this Court should hold that the trial judges power to decide how to instruct the jury should not extend to situations where a defendant and his attorney have decided, as a matter of strategy, that no instruction concerning the defendant’s exercise of

his Fifth Amendment constitutional right not to testify should be given.

In *Gedders v. United States*, 425 U.S. 80 (1976) this Court concluded that a trial court's order directing a defendant not to consult with his attorney during a regular overnight recess, called while the defendant was on the stand as a witness and shortly before cross-examination was to begin, deprived the defendant of the assistance of counsel guaranteed him by the Sixth Amendment. In its opinion, this Court said:

"The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during and after their testimony . . ." *Id.*, at 87

However, this Court concluded:

"But the petitioner was not simply a witness; he was also the defendant . . .

"The recess at issue was only one of many called during a trial that continued over ten calendar days. But it was an overnight recess, seventeen hours long. It is common practice during such recesses for an accused and counsel to discuss events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with

the trial process without a lawyer's guidance." *Id.*, at 88-89

"... To the extent that conflicts remain between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' the conflict must, under the Sixth Amendment be resolved in favor of the right to the assistance and guidance of counsel. *Brooks v. Tennessee*, 406 U.S. 605 (1972)" *Id.*, at 91

In *Brooks*, this Court held that there are limits on the trial judge's ordinary power to control the order of proof. In *Gedders*, this Court held that there are limits on the trial judge's ordinary power to sequester witnesses. The factor in *Gedders*, and one of the factors in *Brooks*, that led to this Court's decision in those cases was the existence of a situation where the exercise of the ordinary powers of the trial court interfered with a defendant's Sixth Amendment right to have the assistance of counsel in plotting trial strategy.

It would make no sense for this Court to hold in *Gedders* that the right to consult with counsel is so important that a conviction must be reversed to preserve it and then rule in the case at bar that after the constitutionally protected consultation has occurred, a trial judge is free to interfere with the strategy arrived at when there is no legal basis for doing so and when the strategy concerns something as important as the exercise of the Fifth Amendment protection against Self-Incrimination.

IV.

CONCLUSION

For all the foregoing reasons, petitioner asks the Court to reverse petitioner's conviction.

Respectfully submitted,

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